SUPREME COURT, U.S.
JUL 24 1970
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 447

EUGENE RIGGIO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EUGENE RIGGIO,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit as follows:

A.

Opinion Below

The United States Court of Appeals for the Second Circuit by judgment entered on June 25, 1970, unanimously affirmed a judgment in the United States District Court

for the Eastern District of New York convicting petitioner and others of possession of goods stolen from interstate commerce and stealing said goods in violation of Title 18 Sections 659 and 2, United States Code, after trial by jury before Honorable Orrin G. Judd, a Judge of said Court.

The opinion of the United States Court of Appeals for the Second Circuit is set forth in Appendix A hereof.

There were no other opinions written in connection with the case.

B.

The Grounds on Which the Jurisdiction of This Court Is Invoked

Jurisdiction of this Court is invoked until Title 28, Section 1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1 of the Rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on June 25, 1970, as aforesaid.

C.

The Questions Presented for Review

1. Did the Court err in failing to grant defendant Riggio a severance?

2. Were the defendant Riggio's rights under the Sixth Amendment violated by the statements of co-defendant's counsel?

3. Were the defendant Riggio's rights under the Fifth Amendment violated by the summation of the prosecutor and co-defendant's counsel?

4. Were the defendant Riggio's rights under the Fifth and Sixth Amendments violated by the introduction of his statement?

D.

Statutes Involved

(1) The statutes involved are Sections 659 and 2 of Title 18, United States Code.

Each of the foregoing is set forth in Appendix B of this petition.

E.

A Concise Statement of the Case and the Material Facts Pertaining to Consideration of the Questions Presented

(1) *Statement of the Case*

Appellant was indicted in the United States District Court for the Eastern District of New York under Indictment No. 68 CR 422. Also named as defendants were James Testa, Anthony Suppa, Anthony Cusumano, Michael J. McCarthy and Gerard Seniscalchi.

The indictment charged all defendants jointly with violation of 18 U. S. Code Sections 659 and 2, arising from the theft of a truck while in interstate commerce and its cargo of diswashers, etc. and possession of both the truck and cargo. A motion to suppress preceded the trial and was denied.

All defendants except Testa and Seniscalchi were convicted of both counts. The defendant Seniscalchi was acquitted of both counts. The defendant Testa was only convicted of one count.

The defendant Riggio was sentenced to three years imprisonment under each count to run concurrently and he was sentenced pursuant to Title 18 Section 4208(a)(2). He is currently at liberty on bail pending appeal.

As previously indicated, the conviction was affirmed on appeal to the United States Court of Appeals for the Second Circuit.

(2) ***Material Facts Pertinent to the Issues Presented***

The facts pertinent to the issues are as follows:

The defendant Riggio offered no evidence, nor did he testify on his own behalf. A statement he allegedly made to a F.B.I. agent consisting only of his telephone number was offered into evidence. A voir dire hearing was held to determine whether the statement was voluntary and the motion to suppress his statement was denied. The telephone number he gave was the same as a number listed on a piece of paper which was allegedly taken from the defendant McCarthy. The piece of paper contained the name Gene Riggio and had the telephone number. A statement made by the defendant McCarthy explaining that the name and number belonged to a boy he coached on a boys' basketball team. Motions were made on behalf of Riggio for a severance under *Bruton* and they were denied.

The defendant Testa was the only one to testify in his own behalf. The defendant Seniscalchi was represented by one Walter Boyles, Esq.

Additional applicable facts are set forth in the Points set forth in the Argument, *infra*.

F.

Basis for Jurisdiction in the United States District Court

The jurisdiction of the United States District Court for the Eastern District of New York was invoked upon the ground that the crimes charged were violations of Federal law, to wit: 18 U.S.C. §659 and 18 U.S.C. §2; allegedly committed within the Eastern District of New York.

G.

Argument Amplifying the Reasons Relied on for the Allowance of the Writ

POINT I

The Court erred in failing to grant the defendant Riggio a severance.

The government as part of their case against the defendant McCarthy, offered a statement that he allegedly made after his arrest.

In addition to the statement, the Government offered testimony concerning a piece of paper taken from McCarthy.

The piece of paper had the name Riggio on it, together with a telephone number (760).

An agent of the F.B.I. testified that he asked Riggio his telephone number and was given the number. The number given by Riggio turned out to be identical with the number written on the slip of paper found in McCarthy's possession (760).

McCarthy's counsel brought out on cross-examination explanatory material also contained in his statement. The nature of this explanatory material was that McCarthy said he was the coach of a basketball team for young boys and the Eugene Riggio referred to was a boy whom he wanted to play on his team.

In considering this statement of McCarthy, it must be viewed in the entire posture of this case. It should be remembered that the evidence against Riggio for the Government consisted of him walking from the back of the premises to the front in the general area of three of the other defendants. The defendant McCarthy was alleged to being amongst the group. He was also allegedly observed

to be sweating profusely. It was obvious that the Government wished the jury to infer from this sweating that McCarthy exerted himself physically in connection with the movement of these heavy items, *viz.* washing machines. Thus, any statement of McCarthy's when combined with the physical evidence in the form of the contents of the piece of paper which tied him to a Eugene Riggio, could not help but prejudice Riggio. The explanatory statement, of course, had a hollow ring. It was certainly stretching the imagination to believe that a jury would treat the identity of names and telephone numbers as a mere coincidence. The best evidence of the probative value attached to this combination of the statement and the contents of the piece of paper is the vigor with which the Government sought to have them both introduced. It is no solace to the Government that the portion of McCarthy's statement that dealt with his attempted innocent explanation was brought out by defense counsel. For it was obvious that once the Government brought these two elements into play, McCarthy's counsel would be remiss if he did not try to lessen its effect with McCarthy's explanation.

Counsel for defendant Riggio moved for a severance and indicated to the Court in a voir dire the fact that if the statement came in, the explanation would follow (758, 759). The defendant McCarthy, of course, did not testify and there was no attempt to redact his statement. Any admonitionary instruction to the jury, of course, would not cure the damage. See *Bruton* v. *U. S.*, 391 U.S. 123.

The *Bruton* case *supra* is the starting point for the new trend which mandated a severance or redaction where statements of one defendant inculpate *another* in a joint trial.

The general principles were enunciated at Page 126 in the following language:

> "We have concluded, however, that Delli Paoli should be overruled. We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule Delli Paoli and reverse."

Thus, the Court did not feel that the judicial admonition was a sufficient safeguard. The criteria became in effect the substantial risk of prejudice.

This line of reasoning was followed in this circuit in the recent case of *U. S. ex rel. LaBelle* v. *Manousi*, 404 F.2d 690. The Court in that case set aside a State murder conviction. The defendants were two brothers, one of whom gave a statement which inculpated his brother the co-defendant. The brother who gave the statement did not testify. When the statement was introduced at the trial it was redacted. All references to the brother's name were removed.

The Court in holding this insufficient and reversing the conviction, stated at Page 692:

> "Thus the explicit reference to Eddie striking the death blow had been excised. But it was clear to the jury from the rest of the confession, and from the other evidence introduced at trial, that Richard and Eddie had been alone in their car with the Snay girl just be-

> fore the death blow was struck. Thus the jurors had to conclude from the redacted confession that either Eddie or Richard, or both, committed the murder. The inculpatory nature of the confession as applied to Edward is not fairly subject to dispute."

See also *Atwell* v. *U. S.*, 398 F.2d 507. This language is equally cogent at bar. It was as clear in the instant case based upon McCarthy's statement and the contents of the slip of paper that the defendant Riggio was involved and implicated. Thus, the jury had to conclude that McCarthy in trying to explain himself inculpated Riggio. Any inferences to be drawn by them based upon the possible falseness of McCarthy's statement had to tarnish, incriminate, inculpate and thereby prejudice Riggio.

It is, therefore, urged that the conviction of Riggio be reversed and a new trial ordered.

In this same vein it should be noted that defendant McCarthy is applying to this Court for a writ. It is believed that one of his points is that he was inadequately advised of his rights prior to making his statement. The defendant McCarthy relies upon *United States* v. *Foy*, 403 F.2d 97 (2nd Cir. 1968). If he is successful, it is submitted that the defendant Riggio's conviction should also be reversed because of the obvious effect of McCarthy's statement upon him.

POINT II

The defendant's rights under the Sixth Amendment were violated.

The Sixth Amendment to the United States Constitution provides for a trial before an impartial jury and confrontation of the witnesses against him. This constitutional right has been held to include the right to have the jurors protected against outside influence.

Parker v. *Gladden*, 87 S. Ct. 468 (1966). This principle was restated by this very Court in the case of *U.S.A. ex rel. DeLucia and Montella* v. *McMann* (373 F.2d 759).

The principle of confrontation of witnesses and the protection of the jurors in reality go hand in hand.

The Courts have applied these principles to varying fact patterns. Thus, in *Parker* v. *Gladden, supra*, they reversed a state murder conviction. This reversal was based upon a statement by a bailiff to the jurors to the effect that the defendant was a bad person and if they made any errors an Appellate Court could correct it. In *U.S.A. ex rel. DeLucia and Montella* v. *McMann, supra*, although the Circuit Court did not grant relief directly, they sent it back to the State Courts, it is apparent that they thought the defendants entitled to relief. The basis of the relief was reliance upon *Parker* v. *Gladden*. The facts that merited the relief was the unsupervised and unauthorized visit to the scene of the crime by several jurors.

The rationale of both *Parker* and *DeLucia* was that in *Parker* in effect the erring bailiff, by his statement, constituted himself a witness and was not subject to cross-

examination although he offered an influence upon the jury. In *DeLucia*, the jurors, by their visit made themselves witnesses and were not subject to cross-examination and their acts of viewing and re-enactment, constituted an outside influence upon themselves.

The conduct of the counsel for defendant Seniscalchi, to wit Mr. Boyles violated the defendant's rights under the Sixth Amendment as interpreted by the two foregoing decisions. Mr. Boyle, during his summation, stated to the jury that he was not a criminal lawyer (1030). This, by implication, of course, indicated that other counsel were and that their clients required criminal lawyers while his client did not: Thus, by implication making the other defendants criminals.

Additionally, when cross-examining an F.B.I. witness, Mr. Boyles asked the agent did you examine their records (554).

> "Q. By that alone, sir, you would have the opportunity to check the records of these various men, did you not? A. I didn't check the records."

Now you have a reference to records implicit in which is police records indicating prior brushes with the law. This would indicate criminal experience and the access to and retention of criminal lawyers.

This conduct was compounded when during the course of his summation counsel went on to say:

> "Now, it may be that the employees of Miller Freight did not act alone. It may be they acted with somebody else. It may be they acted with one, two or some of the defendants. I don't know. Again, say espress—" (1037)

There was no evidence in the record indicating any possible involvement by any employees of Miller Motor Freight. The Court pointed out to counsel that this statement was unwarranted by the record and was not a fair comment or inference to be drawn from the evidence.

The various defendants' motion for a mistrial were denied. The Court indicated to counsel that he acted promptly which he did. However, that was not the test. No hearing was held to ascertain the effect of this statement upon the jury. Indeed the only tangible act of the jury which we have to look to to try to evaluate the effect was the verdict. The verdict seems to bear out a detrimental effect, for Boyle's client was acquitted and all the other defendants were convicted.

Certainly, if the bailiff in *Parker*, and the jurors in *DeLucia* made themselves witnesses then the attorney Boyle in the instant case, by his statements, made himself a witness. This is doubly so when we recognize that it is not idle speculation to assume that a lay jury would assume that defense counsel would have some inside information *viz.*, that some Miller employees were working with the defendants other than Seniscalchi. Of course, Boyle's credibility also would be assured to a lay jury by virtue of his being a member of the bar.

In addition, in his summation the attorney for defendant Seniscalchi stated:

> " . . . that connection assume some of the other defendants have knowledge, which I don't know and which the evidence does not support, but Mr. Seniscalchi, what is the evidence with respect to him?"

"... any defendant or all of the defendants other than Mr. Senecalchi is guilty or is innocent. I do not pretend to know. Some may be guilty, some may be innocent. In the connection, however, I think perhaps there is a misconception."

This action on his part was clearly such an extraneous influence upon a jury that was previously condemned by this Court.

POINT III

The defendant's rights under the Fifth Amendment were violated.

The only defendant who testified on his own behalf was Testa.

During the course of the summation by the prosecutor, the defendant's rights under the Fifth Amendment were violated when the prosecutor stated:

"You remember who testified and who did not. You remember that and you have got to ask yourself why."

The prosecutor contended at a side bar conference that this foregoing statement was modified by language that immediately preceded it. The trial Court in overruling the objection and various requests of defense counsel for a mistrial, etc. seemed to conclude that this was not prejudicial. However, it must be remembered that the prejudice flowing from this statement is not measured by its effect on the thinking of an experienced judge or counsel. The critical question is the effect that it had upon the jury. It is submitted that any statement by the trial Court in its

charge to the effect that the failure to testify must not be considered against a defendant does not sufficiently protect the defendant at bar.

The comment on the failure of the defendant to testify was repeated in effect at Page 1144 of the prosecutor's summation:

> "You remember that he is the only person you heard testify as to how that back room looked that morning, not Testa, not Juliano, not Sampella, not Gambino, not Lillian Stone."

Although the Federal prohibition against a commentary upon a defendant's failure to testify had its origin in a Federal rule, it has nevertheless been held to be of constitutional dimensions. See *Griffen* v. *California,* 380 U.S. 609 (1965).

The time honored decision on the subject is *Wilson* v. *United States,* 149 U.S. 60 (1893). The Court in reversing the conviction of a defendant stated at Pages 66, 67:

> "In this case this provision of the statute was plainly disregarded. When the District Attorney, referring to the fact that the defendant did not ask to be a witness, said to the jury, 'I want to say to you, that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime,' he intimated to them as plainly as if he had said in so many words that it was a circumstance against the innocence of the defendant that he did not go on

> the stand and testify. Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled, and which by the statute he could not lose by a failure to offer himself as a witness."

It is submitted that the two comments made by the prosecutor of necessity had the same effect at bar as was foreseen by the Court in *Wilson (supra)*.

The *Wilson* case was recently followed by the Supreme Court in the case of *Griffen* v. *California*, 380 (U.S. 609 (1965)). In the *Griffen* case, the Court struck down a State conviction which was rooted in a California statute which permitted comment on failure of a defendant to testify. In so doing, the Court at Page 612 stated its reliance on *Wilson (supra)*:

> "If this were a federal trial, reversible error would have been committed. Wilson v. U. S., 149 U.S. 60 so holds."

The Court in *Griffen (supra)* did not indicate a tendency to quibble about the precise language of any commentary, it condemned commentary on silence in rather absolute language on Page 615:

> "We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt."

In *Wilson, supra,* the Court went on to comment with approval on a decision in the Illinois Courts. In so doing, they adopted language which is admirably suited to the case at bar (Page 70):

> "We do not see how this statute can be completely enforced, unless it be adopted as a rule of practice that such improper and forbidden reference by counsel for the prosecution shall be regarded good ground for a new trial in all cases where the proofs of guilt are not so clear and conclusive that the court can say affirmatively the accused could not have been harmed from that cause."

It should be remembered at bar we have physical presence in a building with at the least dispute as to what portion of the building. Therefore, in light of this can we say affirmatively that the defendants who did not testify were not harmed by the comments on their failure by the prosecution?

We think not.

In passing, it should also be noted that counsel for the defendant who testified (Testa) implicity commented in his summation on the fact that the other defendants did not testify. While we recognize that the condemnation of such comment seems to be limited to cases where the Court or prosecutor do so, we submit in the posture of this case it was prejudicial in its cumulative effect.

In addition to all of this, counsel for defendant Seniscalchi impliedly commented on the failure of other defendants to testify or allow their statements into evidence without objection when he stated in his summation:

"Nobody said he tried to run. He gave his right name and what has he done to prove his innocence, although he is not required to? I submit he gave you the unvarnished best truthful evidence.

Mr. Seniscalchi stands on what he said at the time the police approached him. He is not trying to hide behind anything. He introduced his own statement in evidence. I asked that it be introduced in his behalf as his attorney. I remember I read it to you. This is what he said, Mr. Seniscalchi."

The cumulative effect of all of this commentary, both direct and implied, must be considered in weighing the prejudice.

When this is done, it is submitted that the total effect is that the defendant Riggio's rights under the Fifth Amendment were violated.

POINT IV

Appellant Riggio was inadequately advised of his constitutional rights against self-incrimination: his statement, therefore, was erroneously admitted.

On its direct case, the Government was permitted to elicit from the testimony of Agent Haridopolo's statements allegedly made by Appellant Riggio. The admission of the statement came after a determination by the trial court that proper warnings were given and consequently that the statement was voluntary in nature. Appellant herein respectfully submits that this finding was in error.

It was the testimony of Agent Haridopolos that he warned Appellant Riggio together with Suppa and McCarthy. Before any questions were asked of Appellant Riggio and the others, the following warnings were given:

> "Q. What did you say to them? A. I said to them that they didn't have to make any statement, that any statement they did make could be used against them in a Court of Law. They are entitled to an attorney to be present while they made any statement and if they could not afford an attorney, the Court would appoint one" (R. 389).

Later in his testimony, Agent Haridopolos again states that the warning given with respect to the right to remain silent was that he "didn't have to make any statements" (R. 400). Earlier, during the agent's direct testimony, he stated that the Appellant Riggio and the others were warned that "they have a right to remain silent . . . " (R. 375). This contradiction was never fully resolved. At p. 418 the record reflects the following:

> "The Court: . . . with respect to the right to remain silent, the Fox case said you didn't have to make a statement, which they said might refer to a—which the Court said might refer to a formal statement not an advice that you have a right to remain silent. Here he said you don't have to answer any questions. I think that would do as to having a right to remain silent.
>
> Mr. Newman: I thought my recollection was on the question that I asked him, he used the language, 'you have a right not to make a statement.' That was my recollection."

The Trial Court apparently never reached a determination as to exactly how, in fact, the warnings were given. In view of this contradictory testimony the Appellants herein respectfully submit that this Court must find that the Trial Court's ruling that the statements were voluntary was in error. Recent case decisions clearly suggest the rule to be that the Government has the burden of proof when the issue of voluntariness of a defendant's statement is put in issue. *Jackson* v. *Denno*, 378 U.S. 368 (1964); *Sims* v. *Georgia*, 385 U.S. 538 (1967); *Arrington* v. *Maxwell*, 409 F.2d 849 (6th Cir. 1969). Because of this equivocal testimony in the instant case the Government has failed to sustain that burden.

A decision by the Second Circuit Court of Appeals in *United States* v. *Fox*, 403 F.2d 97 (2nd Cir. 1968) has made it clear that where a criminal defendant is told that "he didn't have to make any statement", this would not comply with the standards set forth in *Miranda* v. *State of Arizona*, 384 U.S. 436 (1966). At page 100, the Court states:

> "(1) *Miranda* requires that the accused be told that he has 'the right to remain silent.'. Fox was merely told 'he didn't have to make any statement.' This is by no means the same thing. It could easily be interpreted to mean that Fox did not have to make a formal statement rather than that he need not answer any questions or say anything at all."

In view of the unmistakable similarity between *Fox*'s warning and the warning to Riggio in this regard, there can be no question but that the instant warning fails to meet the minimum standards prescribed by the Supreme Court in *Miranda* and as amplified by the Court of Appeals in *Fox*.

Further, Appellant contends that the warnings given him did not convey the message that he had the right to an attorney at the very time in question. Agent Haridopolos testified as follows:

> "Q. You didn't tell them, 'If you wanted a lawyer, you would call and have the Court send one down right then and there. A. I didn't tell them that."

In view of this testimony, the Appellant submits that the admission of his statement was contrary to the Court of Appeals' ruling in *Fox, supra*. Here, too, there was no indication given to the Appellant that he had the right to have an attorney present during the interrogation.

It should be noted that the defendant Riggio's statement of his phone number took on great import in this case in the light of McCarthy's statement.

CONCLUSION

The petition should be granted and this Court, in the exercise of its powers, should order that the judgment of conviction be reversed and the indictment dismissed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals, Second Circuit

Nos. 531-535—September Term, 1969.

(Argued February 13, 1970 Decided June 25, 1970.)

Docket Nos. 34092, 34290-34293

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ANTHONY CUSUMANO, MICHAEL JOHN MCCARTHY, EUGENE ARTHUR RIGGIO, ANTHONY SUPPA and JAMES TESTA,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and FEINBERG, *Circuit Judges.*

Appeal from a conviction after a jury trial before Judd, *J.*, United States District Court for the Eastern District of New York, for violations of 18 U.S.C. §659. Affirmed.

JILL WINE VOLNER, Attorney, Department of Justice, Washington, D. C. (Edward R. Neaher, United States Attorney for the Eastern District of New York, Robert Ornstein, Special Attorney, Department of

Justice, and William Murphy, Attorney, Department of Justice, on the brief), *for appellee.*

Michael P. Direnzo, New York, N. Y., *for appellant Anthony Cusumano.*

Eugene F. Mastropieri, Glendale, N. Y., *for appellants Michael John McCarthy and Anthony Suppa.*

Gustave H. Newman, Brooklyn, N. Y. (Evseroff, Newman & Sonenshine, on the brief), *for appellant Eugene A. Riggio.*

James M. LaRossa, New York, N. Y., *for appellant James Testa.*

Lumbard, *Chief Judge*:

Anthony Cusumano, Michael John McCarthy, Eugene Arthur Riggio, Anthony Suppa and James Testa were convicted in the Eastern District after a jury trial before Judge Judd of theft and possession of goods stolen from an interstate shipment in violation of 18 U.S.C. §659. Appellants challenge the sufficiency of the warnings given to them when they were placed in custody. We find that the warnings given satisfy the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) and affirm the convictions.

Sometime during the night of October 24-25, 1968, a truck belonging to Miller Motor Freight was stolen from a freight depot in Brooklyn, New York. The truck, Miller Motor Freight No. 400, had been en route from Harrisburg, Pennsylvania, to Honig's Parkway Stores in the Bronx, New York, and when stolen was carrying 39 RCA

Whirlpool washers, 8 RCA Whirlpool dishwashers and 2 RCA Whirlpool driers. Early in the morning of October 25, 1968, the dispatcher of the freight yard noticed that a truck was missing and notified the police. Shortly thereafter several FBI agents, Pennington, Haridopolis and Beech, stopped at appellant Testa's warehouse in Brooklyn. Testa had just given consent to search his premises, when Agent Pennington saw a trailer with the number 400 on it coming out of the warehouse. Two of the agents ran to the truck and stopped it just after it had pulled out of the gate. Appellant Cusumano was driving the truck. The agents checked the back of the truck but, finding it empty, they walked toward the rear of the premises in the direction from which the truck had come. At this point, four men, appellants McCarthy, Riggio, and Suppa, as well as Gerald Seniscalchi, who was acquitted at trial, were seen emerging from the back of the warehouse. After asking their names, the agents proceeded into the area from which the men had come and discovered a cache of boxes containing Whirlpool products. The agents made a further search and then arrested all the appellants.

At a suppression hearing held on April 30 and May 1, 1969, before Judge Judd, Agents Pennington and Haridopolis, testified, largely about the search of the premises. At the trial both agents again testified regarding the search and the warnings given before the appellants made any statements. Appellants challenge the adequacy of the warnings given to them on a variety of grounds. McCarthy, Suppa and Riggio were in a group coming from the back portion of Testa's premises and each was given the same warning by Agent Haridopolis. Agent Haridopolis testified on voir dire that

> "I said to them that they didn't have to make any statement, that any statement they did make could be used against them in a court of law. They are entitled to an attorney to be present while they make any statements and if they could not afford an attorney, the court would appoint one."

The adequacy of the warnings to these three appellants follows *a fortiori* from *United States* v. *Lamia* decided today.

The warnings given to Testa and Cusumano, which Agent Pennington testified were given by Agent Beech, vary from those given to the other appellants, but still satisfy the *Miranda* standards. At trial Pennington testified that Agent Beech advised Cusumano

> "of his rights, the right to remain silent, right to counsel, that anything he said could be used against him in a court of law and that he didn't have to answer any questions at all."

Earlier, at the suppression hearing, Agent Pennington testified that the warning to Cusumano was phrased as follows:

> "I advised Mr. Cusumano of his rights to remain silent, of his right to an attorney, the fact that any statement he made could be used in the court ~~of law,~~ that he had the right to legal counsel and if he didn't have counsel, it would be appointed [sic] for him . . . ."

Agent Pennington testified at trial that Testa was advised:

> "Of his rights, the right to remain silent, the right to counsel, the right to have an attorney appointed for

> him if he couldn't afford an attorney and anything he said could be used against him in a court of law."

Neither Cusumano or Testa was specifically told that he had the right to have an attorney present during actual questioning, yet such an inference can readily be drawn from the circumstances of the warning. As in *Lamia*, appellants were told without qualification that they have a right to an attorney. Furthermore, Testa and Cusumano, unlike Lamia, were told explicitly that they had a right to remain silent, not to say anything. It is unrealistic to expect the same degree of formality with respect to waiver in questioning "on the street" as in the stationhouse. We agree with the trial judge who found the statement was voluntarily given and in light of the surrounding circumstances that the appellants knowingly and intelligently waived their rights.

A similar warning was upheld in *Sweeney* v. *United States*, 408 F.2d 121 (9th Cir. 1969), where the defendant was advised

> "that he did not have to answer any questions; of his right to remain silent; that any statements made by him could be used against him in a court of law; that he was entitled to an attorney; that if he could not afford an attorney one would be appointed for him; and that he was entitled to use the telephone." 408 F.2d at 124.

Although the court attached importance to the added advice that defendant could use the telephone, it stated:

> "The reference to the right to counsel, following, as it did, immediately on the warning as to the right to remain silent and the risk in not doing so, would, we

think be taken by most persons to refer to the contemplated interrogation, not to some other time, particularly where, as here, appellant was told that he could use the telephone." 408 F.2d at 124.

In view of our conclusion that the warnings satisfied the requirements of *Miranda*, we find it unnecessary to consider the government's claim made for the first time at the argument of this appeal that the confessions were admissible under 18 U.S.C. §3501, 82 Stat. 218 (1968).

Appellant Testa objects that the warehouse was searched before he had been adequately warned of his right not to consent. We find no merit in this argument. See *United States ex rel. Combs* v. *LaVallee*, 417 F.2d 523 (2d Cir. 1969). Testa was an officer of Gold'N'Ripe Banana, the lessee of the warehouse where the goods were found, and was standing at the entrance when the agents approached. Although the evidence is strong that Testa gave his consent to the search, the government does not rely solely on that ground as the search was incident to a lawful arrest. Just as the agents were ending their talk with Testa they saw a truck with Number 400 on it leaving the warehouse and proceeded to stop it. At this point probable cause existed to arrest the driver, Cusumano, and the three appellants who were seen coming out of the back shortly thereafter and the judge would have been justified in finding that their freedom of movement was sufficiently restrained to constitute an arrest. See *Henry* v. *United States*, 361 U.S. 98, 103 (1959); *United States* v. *Thompson*, 356 F.2d 216, 223 (2 Cir. 1965). In view of Testa's consent and the arrests which followed almost immediately there can be no doubt about the propriety of the search.

Appellant Riggio relying on *Bruton* v. *United States*, 391 U.S. 123 (1968), argues that it was error for the trial court

to deny his motion, made before trial, for a severance because of exculpatory statements given by co-defendant McCarthy which the jury must have found false. FBI Agent Roselle testified that he had questioned McCarthy shortly after the robbery and McCarthy had stated that he did not know any of the other defendants. Roselle then told of a slip of paper that was found in McCarthy's pocket, containing the name G. Riggio and the telephone numbers 497-1020 and 497-0332. When Roselle questioned Riggio later that morning Riggio told him that his phone numbers were 497-1020 and 497-0332. On cross-examination by McCarthy's counsel, Roselle testified that McCarthy had told him at the time that the name and numbers belonged to a player on a boys' basketball team of which he was coach. The trial judge emphasized to the jury that the statement was only binding on the defendant who actually made it, and that anything a defendant says that affects another defendant cannot be considered against that other defendant. We find that it was not error for the trial judge to deny a severance. The slip of paper was not hearsay, *United States* v. *Bennett*, 409 F.2d 888, 895 n. 6 (2 Cir. 1969). McCarthy's statement did not implicate Riggio, and the risk that the jury might take his lie as doing so falls within the *Bruton* caveat that there are many cases where the jury can and will follow the trial judge's instruction, 391 U.S. at 135.

Appellants further claim that when the case was submitted to the jury the government should have elected between the count for stealing goods and the count for possession of goods, both charged under 18 U.S.C. §659. We agree with those courts which have passed upon this question, *D'Argento* v. *United States*, 353 F.2d 327 (9th Cir. 1965), cert. denied, 384 U.S. 963 (1966); *Robinson* v. *United States*, 333 U.S. 323 (8th Cir. 1964); *Carroll* v.

United States, 174 F.2d 412 (6th Cir. 1949), that such an election is not required.

Only Testa testified at trial. The other appellants argue that the government made impermissible comments on their failure to take the stand. They rely on one phrase in the prosecutor's summation in which he said "You remember who testified and who did not. You remember that and you have got to ask yourself why." Taken out of context this statement would seem to be an impermissible comment on the failure of certain of the defendants to testify. In the setting in which it was made, however, we do not believe that any prejudice occurred. Throughout the trial there was dispute as to how the four defendants had come to be in the back of the warehouse. The appellants claimed that they had just come through a back door, but the government contended this was not possible as no such door existed at the time. During his summation the prosecutor focused on this issue and after a prolonged discussion that takes several pages in the transcript he stated:

> "You remember that he [Agent Haridopolis] is the only person you heard testify as to how that back room looked that morning, not Testa, not Juliano, not Sampella, not Gambino, not Lillian Stone."

Shortly after this remark, in his closing phrases on this point, the prosecutor made the statement objected to. It is clear that the reference to not testifying referred only to the dispute regarding the existence of a back door to the warehouse and the jury could not have understood it to be more than that.

We have examined appellants' other claims and find them without merit. We affirm the judgment.

APPENDIX B

18 U.S.C. §659:

§659. Interstateor foreign baggage, express or freight; State prosecutions

"Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

18 U.S.C. §2:

§2. Principals

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645; 62 Stat. 684; October 31, 1951, c. 655, §17b, 65 Stat. 717."